CIVIL RIGHTS AND LEGAL WRONGS

A critical commentary upon the President's pending "Civil Rights" Bill of 1963, prepared and distributed by the Virginia Commission on Constitutional Government. ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★

CIVIL RIGHTS AND LEGAL WRONGS

From the moment the President's omnibus
Civil Rights Bill was introduced in June,
the entire resources of the Federal Government
have been thrown behind its support.
As a consequence, many Americans
have heard only a case *for* the bill.

This commentary is an attempt to present
the other side.

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CIVIL RIGHTS AND LEGAL WRONGS

The logic is said to go something like this: All decent Americans should support good things. All decent Americans should oppose bad things. Racial discrimination is a bad thing. Bills to prohibit racial discrimination are good things. The President's pending Civil Rights Bill is intended to prohibit racial discrimination. Therefore, his bill is a good thing, and all decent Americans should support it.

If this were all there were to it—if the problem were as simple as A plus B, and therefore C—nothing could be gained by further discussion of the President's proposal. All decent Americans would be of one mind.

But the problems that have produced this bill are not easy problems, and the bill is not a simple bill. One of the great distinctions of the American system is that we try always to distinguish between the means and the end—between the goal itself, and the way in which a goal is reached. Such careful distinctions need to be made in this case.

We believe this bill is a very bad bill. In our view, the means here proposed are the wrong means. The weapons the President would contrive against race prejudice are the wrong weapons. In the name of achieving certain "rights" for one group of citizens, this bill would impose some fateful compulsions on another group of citizens. The bill may be well-intentioned—we question no man's motivation in supporting it—but good intentions are not enough. In this area, we need good law. And the President's bill, in our view, is plain bad law.

That is perhaps the least that could be said of it. In our judgment, this bill violates the Constitution in half a dozen different ways:

It would tend to destroy the States' control of their own voting requirements.

It would stretch the Commerce Clause beyond recognition.

It wrongly would invoke the 14th Amendment.

It would undermine the most precious rights of property.

It would raise grave questions of a citizen's right to jury trial.

The bill would open new doors to the forces of government regimentation.

And in the end, because of the violence that would be done to fundamental law, Americans of every race would suffer equal harm.

The emotionalism of this turbulent summer is largely responsible for the serious attention now given the bill and for the eminent voices raised in its behalf. In a calmer climate, the bill's defects would be readily apparent. But this is not a calm time; it is a passionate time, and dispassionate thought comes hard. What is here proposed, in this brief pamphlet, is simply that we sit down and reason together. Those of us who strongly oppose the bill believe our position is sound. We should like to explain this position to you.

THE BILL ITSELF

Mr. Kennedy's omnibus Civil Rights Bill of 1963 (S. 1731) is divided into seven major titles. Briefly:

- Title I relates to "voting rights." It would place elaborate new controls upon the States' constitutional authority to fix the qualifications of voters.

- Title II relates to "public accommodations." It would compel the owner of almost every business establishment in the United States to serve all persons regardless of race.

- Title III, relating to the "desegregation of public education," would vest sweeping new powers in the U. S. Commissioner of Education and the Attorney General to deal with "racial imbalance" in schools throughout the country.

- Title IV would set up a new Federal agency, the "Community Relations Service."

- Title V would continue the Commission on Civil Rights until 1967, and endow it with broad new authority.

- Title VI amends all statutes providing financial assistance by the United States by grant, contract, loans, insurance, guaranty, or otherwise. It would permit such assistance to be suspended upon a finding of racial or religious discrimination.

- Title VII authorizes the President to create a "Commission on Equal Employment Opportunity," possessed of "such powers as may be conferred upon it by the President" to prevent discrimination under contracts in programs or activities receiving direct or indirect financial assistance from the United States government.

This is what the bill is all about. At first glance, perhaps, many persons may see nothing wrong in the several proposals. In this emotional hour, one is tempted to leap from a sincere conviction that discrimination is wrong, to a false conclusion that a Federal law is the proper way to prevent it. We do not believe the intensely personal problems of racial feeling can be solved by any Federal law; the roots go deeper than Congress can reach. In any event, we believe that whatever might be gained by this particular Federal law, if anything, the positive harm that would be done to constitutional government would far outweigh the hypothetical good.

TITLE I—VOTING RIGHTS

In the United States, beyond all question, the right to vote is just that—a *right* to vote. For most Americans, probably the ancient right of property ranks first in their daily lives; it is the oldest right of all. But as political beings, they view the right to vote as basic. As the President has said, it is ultimately the right on which the security of all other rights depends.

A moment's reflection, however, reminds us that the right to vote is not an absolute right. Children cannot vote. Lunatics cannot vote. Certain convicts cannot vote. Beyond these obvious limitations, it is evident that persons in Virginia cannot vote for a Senator from New York. Residents of Albany cannot vote for the City Council of Schenectady. And the man who moves to Manhattan on a Monday cannot vote for the Mayor on Tuesday. These are elementary considerations, of course, but it does no harm to spell them out.

Why is all this so? It is because the right to vote, though it is described in the 15th Amendment as a right accruing to "citizens of

the United States," is in its exercise a right accruing to citizens of the several separate States. It never should be forgotten that whenever we vote, we vote as citizens of our States. We never vote nationally. We are always, at the polls, Virginians, New Yorkers, Texans, Missourians. As voters, we are never "Americans." The idea is hard to get accustomed to; but it is so. The Constitution makes it so.

Three provisions of the Constitution merit attention. First, the 15th Amendment. It is very short:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State *on account of race, color, or previous condition of servitude.* [Emphasis added].
>
> The Congress shall have power to enforce this article by appropriate legislation.

The briefest perusal of Mr. Kennedy's pending Civil Rights Bill will disclose that some of its most important provisions are not related to the denial or abridgment of the right to vote "on account of race, color, or previous condition of servitude." The 15th Amendment is not relied upon at all. If the bill were based clearly upon the Fifteenth, the position of the Virginia Commission would be wholly different. We might object that a bill along these lines were unwise, or unwarranted; but we would not oppose it as unconstitutional. No. In its provisions relating to a standard literacy test, and in other provisions, the administration's bill has nothing to do with State deprivals in the area of "race, color, or previous condition of servitude." *This bill applies to all citizens, everywhere.*

Therefore, other provisions of the Constitution come into play. The first of these provisions appears in the second paragraph of Article I. It tells us who shall be qualified to vote in what often are termed Federal elections—that is, who shall be qualified to vote for members of the Congress. It reads:

> The House of Representatives shall be composed of members chosen every second year *by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.* [Emphasis supplied].

The final provision of the Constitution of concern to us here is to be found in Article I, Section 4. It reads:

> The *times, places,* and *manner* of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof: But the Congress may at any time by law make or alter *such regulations,* except as to the places of choosing Senators. [Emphasis supplied].

Now, keeping these provisions in mind for the moment, consider what is proposed in Title I of Mr. Kennedy's omnibus bill. We find some astounding things.

First, and this is merely by way of example, we may note that the power of the States to impose a poll tax (for good or ill) has not yet been repealed. A constitutional amendment to achieve that end is actively pending. At the time the President's bill was introduced, 36 States—but not the necessary 38 States—had agreed to a constitutional amendment to prohibit such taxes. As this is written, poll taxes are as lawful, as constitutional, as any other tax. But the President's bill simply ignores the process of formal constitutional amendment. It is as if the pending constitutional amendment did not exist. The bill proposes by simple statute to declare that "No person acting under color of law shall . . . deny the right of any individual to vote in any Federal election because of an omission of such individual relating to payment of poll tax." The Virginia Commission takes no position, one way or another, on the merits of a poll tax. Obviously, with the votes of only two States to go, the levy is about to be abolished. Very well, we would say; let it go. The point is that the machinery already is fully in motion for abolition of this tax by proper constitutional process, but the Administration is unwilling to wait upon such machinery. It is filled with impatience. It cannot pause. So the President's bill undertakes to accomplish by simple congressional enactment what the Congress has decreed may be accomplished only by constitutional amendment.

This comparatively minor provision, of potential application to five States only, is cited by way of example, to suggest the zeal for hurried change that underlies this title of the bill. Title I goes on to lay down rules for the use of literacy tests, not as such tests may affect persons of "race, color, or previous condition of servitude," but as they may affect *every* person. Here the bill leaves the 15th Amendment altogether, and trespasses upon the other constitutional pro-

visions quoted. The bill would prohibit the use by any State of a literacy test unless such tests met Federal requirements—unless the tests were "wholly in writing" and unless a copy of such test were furnished the individual registrant "within 25 days of the submission of his written request." Beyond this, the bill would provide that State literacy tests were of no consequence anyhow: Any person who had completed the sixth grade in a public school or an accredited private school would arbitrarily be deemed to possess "sufficient literacy, comprehension, and intelligence to vote in any Federal election."

We take no position here on the merits of these proposals as such. They are as may be. Our contention is that such proposals plainly deal with the qualifications of electors in the several States. These proposals have nothing whatever to do with the "times, places, and manner of holding elections." In our view, they are simply beyond the authority of the Congress to enact. They plainly encroach upon the power of each State to fix "qualifications requisite for electors of the most numerous branch of the State legislature."

The President's bill continues with a provision aimed at certain of the Southern States, in which—in a scattering of counties—fewer than 15 percent of the adult Negroes have registered to vote. The Virginia Commission would make its own position clear: We have no patience with conspiracies or chicanery or acts of intimidation intended to deny genuinely qualified Negroes the right to vote. We have no patience with acts of bland partisanship that may give the vote to certain white persons and prohibit the vote to Negroes of equal stature. Wherever such acts have occurred, they are to be emphatically condemned. We do say this: There is abundant law on the books—there was abundant law on the books even prior to enactment of the Civil Rights Acts of 1957 and 1960—to prohibit and to punish such willful acts by local registrars. All that is required is that the existing laws be enforced. If the Congress somehow is persuaded that still further law is required to enforce the 15th Amendment, the Virginia Commission will raise no constitutional objection. In the area of "race, color, or previous condition of servitude," the Amendment plainly vests in Congress the power to adopt appropriate legislation.

We come back to the larger point. The key provisions of Title I, as a whole, have nothing to do with "race, color, or previous condition of servitude." These provisions assert, on the part of the

Congress, some power to fix general qualifications for voters throughout the United States. If this principle be accepted, as to literacy tests and the rest, it must follow that the Congress may fix a uniform age for voters, a uniform period of residence in State or city or precinct, and in every other fashion control the qualifications of electors. For sound reasons, the Constitution deliberately left the fixing of such qualifications in the control of each separate sovereign State. When the President's bill attempts to ride roughshod over this plain provision of the supreme law of the land, the President's bill violates the Constitution. And we object.

The person who takes the time and trouble to read the remaining provisions of Title I will find many other areas of grave concern to those who believe in adhering to the Constitution. Only in the interests of a decent brevity do we pass over them here, in order to get to the even more outrageous provisions of—

TITLE II. PUBLIC ACCOMMODATIONS

Perhaps the most obvious wrongness of Title II may be summed up in a phrase: This section is conceived in hypocrisy, and cannot rise above its shabby origins.

Title II opens with a long recital of "findings." In these opening paragraphs, the Congress purportedly "finds" all sorts of burdens upon interstate commerce, all resulting from acts of racial discrimination. It is of passing interest to inquire how the Congress has found these things, for the Administration's witnesses have provided no convincing evidence to point them out. Possibly we are to rely on faith alone. In any event, the Congress here "finds" that a substantial number of Negroes, traveling in interstate commerce, are denied convenient access to hotels, motels, and eating accommodations; that practices of audience discrimination in the entertainment industry create "serious and substantial" burdens upon interstate commerce; that fraternal, religious, and scientific conventions "frequently" are dissuaded from meeting in particular cities by reason of discriminatory practices; that business organizations "frequently" are hampered in setting up branch plants by reason of discrimination; and finally, that—

(h) The discriminatory practices described above are in *all*

cases encouraged, fostered, or tolerated in some degree by the governmental authorities of the States in which they occur, *which license or protect the businesses involved by means of laws and ordinances and the activities of their executive and judicial officers.* [Emphasis supplied].

This is the strange and ominous foundation on which Title II is made to rest. Read it, we beg you. Ponder it! Reflect, if you please, upon this assertion of some Federal authority over any business that may be "licensed" by State authority. Reflect, if you please, upon the vagueness of these "activities" of a State's executive and judicial officers. Because the very next sentence of this "finding" ties it all together:

> Such discriminatory practices, particularly when their cumulative effect throughout the Nation it considered, *take on the character of action by the States and therefore* fall within the ambit of the equal protection clause of the 14th Amendment to the Constitution of the United States.

The object of this smooth leaping and hurdling is apparent to the most casual student of the Constitution. Obviously, the 14th Amendment does not prohibit acts of private discrimination in ordinary daily life. The Supreme Court of the United States repeatedly has said so. In an unbroken chain of opinions reaching back to 1883, the Court has ruled that the amendment prohibits only those acts of discrimination that may be charged to the States themselves in such areas as voting rights, jury service, and access to public institutions. The amendment says that "no State" shall deny equal protection. What individuals do is their own business. But suppose—as this bill proposes—that individual acts "take on the character of State acts"? In this event, the smallest retail establishment, the humblest soda fountain, "takes on the character" of the State itself. In effect, it becomes an agency of the State. Its acts are State acts. Its denials are State denials. And in this fateful moment, the ancient distinctions between private property and public agencies fly out the window. Under the precedent here proposed, private property, as such, in this regard will have ceased to exist.

This is the very crux of Title II of the President's bill. These easy "findings" do not affect the South alone. They affect every State, every locality, every businessman. In this mad confusion of

the Commerce Clause and the 14th Amendment, nothing makes sense. The alleged acts of racial discrimination by private business establishments simultaneously are found to be burdens upon interstate commerce and denials of equal protection by the States themselves.

The final finding reflects this confusion:

> (i) The burdens on and obstructions to commerce which are described above can best be removed by invoking the powers of Congress under the 14th Amendment and the commerce clause of the Constitution of the United States to prohibit discrimination based on race, color, religion, or national origin in certain public establishments.

We invite the thoughtful reader to go back and read that paragraph once again. Ostensibly, the bill is here concerned with "burdens on and obstructions to" commerce. The power of the Congress in this area derives from Article I, Section 8, vesting in Congress the power "to regulate commerce among the several States." But the object of this bill is not really to regulate commerce. The object of the bill, in its own revealing words, is "to prohibit discrimination." The Commerce Clause is here being deceptively adapted not to commerce, but to social reform.

The substantive provisions of the President's bill then are set forth:

> Sec. 202. (a) All persons shall be entitled, without discrimination or segregation on account of race, color, religion, or national origin, to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of the following public establishments:

And the bill sets them forth. We put them line by line, the better to emphasize the sweep of this bill. The law, by its own terms, is to apply to:

> Every hotel,
>
> Every motel,
>
> Every other public place engaged in furnishing lodging to transient guests, including guests from other States or

traveling in interstate commerce;

Every motion picture house,

Every theater,

Every sports arena,

Every stadium,

Every exhibition hall,

Every other public place of amusement or entertainment which customarily presents motion pictures, performing groups, athletic teams, exhibitions, or other sources of entertainment which move in interstate commerce; and

Every retail shop,

Every department store,

Every market,

Every drugstore,

Every gasoline station, and

Every other public place which keeps goods for sale;

Every restaurant,

Every lunchroom,

Every lunch counter,

Every soda fountain, and

Every other public place engaged in selling food for consumption on the premises; and

Every other establishment where goods, services, facilities, privileges, advantages, or accommodations are held out to the public for sale, use, rent, or hire . . .

Then follows the superficial saving grace of "if." The provisions of Section 202 are to apply to such establishments "if"

(1) The goods, services, facilities, privileges, advantages, or accommodations offered by any such place or establishment are provided to a substantial degree to interstate travelers, or

(2) a substantial portion of any goods held out to the public by any such place or establishment for sale, use, rent, or hire has moved in interstate commerce . . . .

There are two other such provisions, but it is needless to quote them. The second proviso impales the smallest hotdog stand upon the transportation of its mustard. There is not a neighborhood soda fountain in American, not a dress shop, not a hat shop, not a beauty parlor, not a single place or establishment beyond the tiniest roadside stand of which it may be said that a substantial portion of its goods, held out for sale or use, has not moved in interstate commerce.

We would urge thoughtful Americans, wherever they may live, whatever their views may be on questions of race relations, to ponder the twisted construction here placed upon the Commerce Clause. When the Congress first began to regulate "commerce among the several States," the object was to regulate the carriers in which the goods were hauled. In time, a second area of regulation developed, as the nature of the goods themselves came into the congressional power. Then a third area developed, as Congress sought to regulate the conditions under which the goods themselves were manufactured.

In this bill, a fourth area is opened up. It is as wide as the world. Here the Congress proposes to impose a *requirement to serve*. Heretofore, such a requirement has been imposed solely in the area of public service corporations—the telephone companies, electric power companies, gas and water companies—the companies that operate as regulated public utilities. Now the restricted class of public service corporations is to be swept aside. Here Clancy's Grill and Mrs. Murphy's Hat Shoppe are equated with AT&T. The neighborhood drug store is treated as the gas company: *It must serve*. Within the realm of Section 202, the owner has no option, no right of choice. Yes, he may reject drunks, rowdies, deadbeats. But his right to discriminate by reason of race or religion—or any other related personal reason—is denied him under the pain of Federal injunction and the threat of prison sentence for contempt of court.

At this point in our argument the Virginia Commission would beg the closest attention: We do not propose to defend racial discrimination. We do defend, with all the power at our command, the citizen's right to discriminate. However shocking the proposition may sound at first impression, we submit that under one name or another, this is what the Constitution, in part at least, is all about. This right is vital to the American system. If this be destroyed, the whole basis of individual liberty is destroyed. The American system does not rest upon some "right to be right," as some legislative majority

may define what is "right." It rests solidly upon the individual's right to be wrong—upon his right in his personal life to be capricious, arbitrary, prejudiced, biased, opinionated, unreasonable—upon his right to act as a free man in a free society.

We plead your indulgence. Whether this right be called the right of free choice, or the right of free association, or the right to be let alone, or the right of a free market place, this right is essential. Its spirit permeates the Constitution. Its exercise colors our entire life. When a man buys union-made products, for that reason alone, as opposed to non-union products, he discriminates. When a Virginian buys cigarettes made in Virginia, for that reason alone, as opposed to cigarettes made in Kentucky or North Carolina, he discriminates. When a housewife buys a nationally advertised lipstick, for that reason alone, as opposed to an unknown brand, she discriminates. When her husband buys an American automobile, for that reason alone, as opposed to a European automobile, he discriminates. *Every one of these acts of "discrimination" imposes some burden upon interstate commerce.*

The examples could be endlessly multiplied. Every reader of this discussion will think up his own examples from the oranges of Florida to the potatoes of Idaho. And the right to discriminate obviously does not end with questions of commerce. The man who blindly votes a straight Democratic ticket, or a straight Republican ticket, is engaged in discrimination. He is not concerned with the color of an opponent's skin; he is concerned with the color of his party. Merit has nothing to do with it. The man who habitually buys the *Times* instead of the *Herald Tribune,* or *Life* instead of *Look,* or listens to Mr. Bernstein instead of to Mr. Presley, is engaged in discrimination. Without pausing to chop logic, he is bringing to bear the accumulated experience—the prejudice, if you please—of a lifetime. Some non-union goods may be better than some union goods; some Democrats may be better than some Republicans; some issues of *Look* may be better than some issues of *Life.* None of this matters. In a free society, these choices—these acts of prejudice, or discrimination, or arbitrary judgment—universally have been regarded as a man's right to make on his own.

The vice of Mr. Kennedy's Title II is that it tends to destroy this concept by creating a pattern for Federal intervention. For the first time, outside the fully accepted area of public utilities, this bill undertakes to lay down a compulsion to sell.

We raise the point: If there can constitutionally be a compulsion to sell, why cannot there be, with equal justification, a compulsion to buy? In theory, the bill is concerned with "burdens on and obstructions to" commerce. In theory, the owner of the neighborhood restaurant imposes an intolerable burden upon interstate commerce if he refuses to serve a white or Negro customer, as the case may be. But let us suppose that by obeying some injunction to serve a Negro patron, the proprietor of Clancy's Grill thereby loses the trade of ten white patrons. In the South, such a consequence is entirely likely; it has been demonstrated in the case of Southern movie houses. Can it be said that the refusal of the ten whites imposes no burden on interstate commerce? Plainly, these ten intransigent customers, under the theory of this bill, have imposed ten times as great a burden on commerce among the several States. Shall they, then, be compelled to return to Clancy's for their meals? Where does this line of reasoning lead us?

How would all this be enforced? Under Title II, the Attorney General would be required to investigate complaints of denial of service. Persistent acts of discrimination would be prohibited by Federal injunctions, obtained in the name of the United States. Any person who attempted to interfere with Clancy's decision would be subject to individual injunction. And at the end of every such proceeding lies the threat of fine or imprisonment for contempt of court. *There would be no jury trials.*

This has been a very abbreviated summary of the "public accommodations" features of the President's bill. A definitive analysis could be much extended. Not only is the Commerce Clause distorted beyond recognition, the provisions of the Fourteenth Amendment also are warped to cover individual action as opposed to State action. Our hypothetical Clancy could not call upon the police to eject an unwanted customer, trespassing upon his booths and tables. Reliance upon local police to enforce old laws of trespass, under this bill, would be regarded as an exercise of "State action." Clancy has become the State. Like Louis of old, he too may say, "L'état, c'est moi."

TITLE III—DESEGREGATION OF PUBLIC EDUCATION

Title III of the President's bill goes far beyond all decisions of the Supreme Court in the field of school desegregation, for it im-

plicitly couples the formal desegregation of public schools in the South with the elimination of "racial imbalance" in schools throughout the land. The bill proposes to achieve these aims by vesting broad new powers in the Commissioner of Education and the Attorney General. Even private schools, if their pupils received tuition grants from a governmental source, would be brought into line.

The opening provisions of Title III authorize the Commissioner, upon application from local school officials, to engage in a wide variety of programs of advice, technical assistance, grants, loans, contracts, and training institutes. The Commissioner would control the amounts, terms, and conditions of such grants. They would be paid on the terms he prescribed. He alone would fix all "rules and regulations" for carrying out these programs to promote desegregation and to relieve "racial imbalance."

Presumably, the authority of Congress to promote this busywork for the Commissioner is to be found in the fifth section of the 14th Amendment. This is the section that empowers Congress to adopt "appropriate legislation" in support of the Equal Protection Clause. If the Equal Protection Clause truly were intended to prohibit a State from maintaining racially separate public schools, such legislation perhaps would be "appropriate." The history of public education in the United States, in the years immediately following the purported ratification of the 14th Amendment in 1868, utterly denies any such intention. To this day, no law of the United States requires desegregation. These programs of the Commissioner of Education are cart before horse; they are the sort of programs that would implement a law if there were a law; but there is no law. There is the Supreme Court's opinion of 1954 in *Brown* v. *Board of Education*, and there are other high court opinions emanating from it, but impressive and historic as these decisions may be, they are still no more than judgments binding named defendants in particular lawsuits.

It should be emphasized, again, that these decisions have nothing to do with "racial imbalance" in public schools. They are limited to judgments requiring that the States shall not deny to any person on account of race the right to attend any school it maintains. The shifting of students from school to school in order to "remove racial imbalance," with or without Federal aid and regulation, is not within the ambit of the desegregation decisions. Under this gross distortion of the 14th Amendment, school children throughout the country would become pawns in a game of power politics.

It seems to us desirable to keep this distinction in mind, between laws enacted by the Congress, and judgments imposed by the court. The Constitution is the supreme law of the land, but when the court acts in a suit arising under the Constitution it acts judicially, not legislatively. If local school boards throughout the South are to be prohibited *by law* from maintaining separate school systems, a law must be passed "pursuant to the Constitution" to impose such a prohibition. Until then, any such grants and loans and training programs as these would appear premature. And we would take the position, in the light of the history of the 14th Amendment, that such a law would not be "pursuant to the Constitution." It would violate the plain intention both of those who framed the amendment and also of the States that ratified it. Such legislation would not be "appropriate" legislation.

Meanwhile, we do not intend to be captious or legalistic. The *Brown* decision has been treated as if it were indeed legislation. For good or ill, the desegregation of public schools proceeds. These particular provisions of Title III are better subject to criticism simply as manifestations of the bureaucratic Federal sprawl.

More serious, in our view, are the provisions of Title III that would vest elaborate new powers in the Attorney General. The effect of these provisions would be to throw the entire massive weight of the Department of Justice, with its unlimited resources, into the scales of almost any parent in search of a free lawsuit. The basic complaint would be that some local school board "had failed to achieve desegregation." But as we have tried to point out, in the overwhelming majority of school districts in the South, there is now no legal requirement that local school boards even attempt to achieve desegregation. Before there can be a failure of a duty, there must first be a duty. These provisions of the bill simply assume the duty, and leap to its failure.

Our apprehension is that the awesome power here proposed, for a proliferation of suits "in the name of the United States," would create more turmoil than it would settle. The "orderly progress of desegregation in public education" would not be enhanced, but impaired, as resentments were stirred up that otherwise might be peacefully resolved. And we cannot see the end to the bureaucracy that could be required to prosecute suits "in the name of the United States," once this precedent were set in the single area of school desegregation.

TITLE IV—ESTABLISHMENT OF COMMUNITY RELATIONS SERVICE

This title would create a new Federal agency, the "Community Relations Service," headed by a director at $20,000 a year. Presumably, it would fulfill some functions not now fulfilled by the Civil Rights Commission, the President's Fair Employment Practices Committee, the established churches and various civic bodies, the countless racial commissions around the country, and the civil rights division of the Department of Justice. The duties of this Service would be "to provide assistance to communities *and persons therein* in resolving disputes, disagreements, or difficulties relating to discriminatory practices." [Emphasis supplied].

We are not inclined to haggle over the amount of time, energy and money that might be wasted by one more Federal agency in the civil rights field. We do call attention to the italicized language. In our own view, it simply is not the function of Congress, under any provisions of the United States Constitution, to dispatch Federal agents to countless communities in order to resolve racial disagreements among "persons therein."

TITLE V—COMMISSION ON CIVIL RIGHTS

The Virginia Commission on Constitutional Government expresses neither opposition to nor support of Title V of the President's bill. This portion of the bill would extend the life of the Commission on Civil Rights to November 30, 1967, and would lay down certain standardized rules for its further hearings and investigations.

In our own view, the Commission on Civil Rights has contributed little or nothing toward the unraveling of the knotty tangles of race relations in the United States. Its recommendations in the spring of 1963, proposing the withdrawal of grants, loans, and even contracts from Southern States that did not meet its own notions of right conduct, amounted to an outrageous proposal for denial of the very equal protections it professes to support. We perceive no useful achievements of this Commission, but we raise no constitutional objections to its continuance.

TITLE VI—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

Title VI of the President's bill is not long. It had perhaps best be quoted in full:

> Sec. 601. Notwithstanding any provisions to the contrary in any law of the United States providing or authorizing direct or indirect financial assistance for or in connection with any program or activity by way of grant, contract, loan, insurance, guaranty, or otherwise, no such law shall be interpreted as requiring that such financial assistance shall be furnished in circumstances under which individuals participating in or benefitting from the program or activity are discriminated against on the ground of race, color, religion, or national origin or are denied participation or benefits therein on the ground of race, color, religion, or national origin. All contracts made in connection with any such program or activity shall contain *such conditions as the President may prescribe* for the purpose of assuring that there shall be no discrimination in employment by any contractor or subcontractor on the ground of race, color, religion, or national origin. [Emphasis supplied].

The thinly veiled intimidation of Title VI goes back to a statement made by Attorney General Robert Kennedy in London in October of 1962. At that time, he speculated publicly that a threat to withdraw Federal subsidies, grants, loans, and contracts might be used as a club over the Southern States. Mr. Kennedy was quick to point out that such a threat would have to be used with great delicacy. He seemed unsure of its desirability. He did not defend its constitutionality. He was just thinking aloud.

In April of 1963, the Civil Rights Commission evidenced no such finesse. The Commission recommended flatly to the President that he seek power to suspend or cancel either all, or selected parts of, the Federal financial aid that now flows to such States as Mississippi, "until [such States] comply with the Constitution and laws of the United States." It was unclear precisely how a judicial determination would be reached that entire States had failed to comply with the Constitution and laws of the United States, but this small question of due process apparently troubled the Commission not at all.

The question troubled Mr. Kennedy. In his press conference of April 17, the President blinked at this startling proposal and turned away from it:

> I don't have the power to cut off aid in a general way as was proposed by the Civil Rights Commission, and I would think it would probably be unwise to give the President of the United States that kind of power because it could start in one State and for one reason or another might be moved to another State which has not measured up as the President would like to see it measure up in one way or another.

It is a fair question to ask what happened. What happened between April 17, when the President voiced these comments at his press conference, and June 19, when his majority leader introduced his Civil Rights Bill? How did a power that was "probably unwise" in April become a power that was "essential" in June? The obvious answer is that the interim was marked by widespread racial demonstrations. But it is not pleasant to conclude that the President of the United States may be coerced, intimidated, or black jacked into changing his mind so swiftly on a legislative proposal of fateful importance. What happened?

We earnestly submit that the punitive terms of Title VI of this bill threaten gross violation of every principle of due process of law. No provision whatever is made for determining when individuals "participating in or benefitting from" various programs are "discriminated against." The two sentences of this Title define no terms. They propose no judicial inquiry. They leave hundreds of millions of dollars in "Federal funds," paid for by all of the people—black, white, Liberal, Conservative—at the uncontrolled discretion of the President or someone else who may determine this "discrimination."

These programs include aid to dependent children, aid to the blind, aid to the permanently disabled. They include funds for vocational education, hospital construction, public housing, the insurance of bank deposits. Federal personnel would be authorized to supervise loans by banks and building and loan associations, farm financing of all kinds, government subsidies, conservation programs, small business loans and contracts in any activity affected by government loans, insurance, guaranties, or grants. If a Federal agency made an administrative finding that discrimination exists, Federal support

could be withdrawn and the institution or program wrecked.

To permit a President—any President—to suspend such programs on his own unchecked conclusion that certain beneficiaries are "discriminated against" would violate the whole spirit of uniformity that pervades the Constitution. The supreme law of our land provides that "direct taxes shall be apportioned among the several States according to their respective numbers." Duties, imposts and excises "shall be uniform throughout the United States." There must be a "uniform rule of naturalization" and "uniform laws on the subject of bankruptcies." Many other provisions attest this same concept of equal treatment among the States.

Only by a fantastic distortion of the congressional power under the 14th and 15th Amendments could this Title VI be justified. Its effect would be to penalize the many for the occasional unlawful conduct of the few. Its potential application would jeopardize the very lives and well-being of thousands of innocent and law-abiding persons, including veterans, blind persons, and disabled persons, in order to bludgeon a handful of State officials into line with a President's desires.

It seems to us sufficient merely to quote the language of this tyrannical Title of the President's bill. The language speaks most eloquently for itself.

TITLE VII—COMMISSION ON EQUAL EMPLOYMENT OPPORTUNITY

This final substantive section of the bill authorizes the President to establish a "Commission on Equal Employment Opportunity." This permanent agency of the government would be headed by the Vice President; the Secretary of Labor would serve as vice chairman. There would be up to 15 members in all. An executive vice chairman would run the operation. The Commission would be empowered to employ "such other personnel as may be necessary." The bill defines the commission's duties:

> It shall be the function of the Commission to prevent discrimination against employees or applicants for employment because of race, color, religion, or national origin by Government contractors and sub contractors, and by contractors and sub contractors participating in programs or activities in which

direct or indirect financial assistance by the United States Government is provided by way of grant, contract, loan, insurance, guaranty, *or otherwise*. The Commission shall have *such powers to effectuate the purposes of this title as may be conferred upon it by the President*. The President may also confer upon the Commission *such powers as he deems appropriate* to prevent discrimination on the ground of race, color, religion, or national origin in Government employment. [Emphasis supplied].

Again, it seems to us necessary merely to quote the provisions of the bill in order to make their autocratic nature evident to every thoughtful observer. The power here proposed to be conferred upon the President is virtually unlimited. No legislative limitations of any sort are suggested. The President may confer upon the Commission "such powers as he deems appropriate." And whether these include the power to impose criminal sanctions, or to seek civil injunctions, or to abrogate contracts awarded under sealed bid, no man can say. The Commission's powers would be whatever the President regarded as appropriate; and the definition of "government employment" is as wide as the Federal budget itself. The administration's bill proposes, in effect, that the Congress abdicate, and turn its legislative powers over to the White House. The powers here demanded are not the powers rightfully to be exercised by a President in a free country. These are the powers of a despot.

* * *

There is a final Title VIII in the bill, authorizing the appropriation of "such sums as are necessary to carry out the provisions of this Act." What these sums might amount to, again, no man can say.

This is the package Mr. Kennedy has asked of the Congress. He has asked it in an emotional hour, under the pressures of demonstrators who have taken violently to the streets, torch in hand.

We of the Virginia Commission ask your quiet consideration of the bill. And we ask you to communicate your wishes to the members of the Congress who represent you in the House and Senate.

Richmond,
August, 1963.

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Q.—(From May Craig, the Portland Press Herald) Mr. President, do you think that Mrs. Murphy should have to take into her home a lodger whom she does not want, regardless of her reason, or would you accept a change in the civil rights bill to except small boarding houses like Mrs. Murphy?

A.—The question would be, it seems to me, Mrs. Craig, whether Mrs. Murphy had a substantial impact on interstate commerce. [Laughter]. Thank you.

—The Press Conference,
July 17, 1963.

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